

LS/M/5/06-07

2869 9216

2877 5029

Miss Ida Lee
PAS (Transport) Special Duties
Environment, Transport and Works Bureau
16/F Murray Building
Garden Road
Central
Hong Kong

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BY FAX

Fax No. : 2537 5246

Dear Miss Lee,

Draft subsidiary legislation relating to the rail merger

Further to my comments on the draft Mass Transit Railway (Amendment) Bylaw (LC Paper No. LS85/06-07 refers), I set out at the Annex my further comments on the draft subsidiary legislation relating to the rail merger for your consideration.

I am still scrutinizing the Chinese version of the draft subsidiary legislation and will write to you separately if necessary.

Yours sincerely,

(Connie FUNG)
Assistant Legal Adviser

Encl.

Annex

**Legal Service Division's further comments on the
draft subsidiary legislation relating to the rail merger**

**I. Draft Mass Transit Railway (North-west Railway) Bylaw (draft NWR
Bylaw)**

By-law 2

- (a) In by-law 2, there is no need to define “Corporation” and “the Ordinance” since these terms are already defined in the principal Ordinance.
- (b) In the definition of “bus”, since “North-west Transit Service Area” is already defined in the principal Ordinance, there is no need to include “as defined in the Ordinance” in the definition.
- (c) In the definition of “fare”, please add “on” before “the railway” where it first appears to make the reference consistent with a similar reference “for travel on any bus or on the railway” in the latter part of the definition.
- (d) In the definition of “railway premises”, there is no need to refer to “as defined in the Ordinance” as the term is already defined in the principal Ordinance.
- (e) It is noted that “automatic processing device”, “invalid ticket” and “smart card” are defined in by-law 2. However, no similar definitions have been proposed in the draft Mass Transit Railway (Amendment) Bylaw (draft MTR Bylaw). Please consider adopting a consistent approach for bylaws applicable to the MTR, East Rail and West Rail on the one hand and to the North-west Railway on the other.

By-law 5

In by-law 5(3), the reference “by-law 5(2)” should be revised to “paragraph (2)” to make it consistent with the drafting style adopted in other by-laws of the draft NWR Bylaw (for example, by-law 9(1)).

By-law 9

- (a) In by-laws 9(3) and (4), please improve the drafting to make it clear that the person aged 16 years and over referred to in those by-laws is one who is liable to pay a surcharge.
- (b) In by-law 9(4), please add “service of” after “the date of” to reflect the meaning in the corresponding Chinese text.

By-law 12(1)

Under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), “prescribed”, when used in or with reference to any Ordinance, means prescribed by that Ordinance or by subsidiary legislation made under that Ordinance. If the Corporation intends that the administration charge referred to in the proposed by-law 12(1) is to be determined by the Corporation administratively rather than prescribed by the draft NWR Bylaw, please consider replacing “prescribed” with “determined”.

By-law 17

Please clarify why by-law 17 is necessary. It is noted that there is a similar provision (i.e. by-law 41) in the existing Kowloon-Canton Railway Corporation By-laws (Cap. 372 sub. leg. B) (KCRC By-laws); but that provision is not proposed to be included in the draft MTR Bylaw. Is there any reason for including by-law 17 in the draft NWR Bylaw?

By-laws 15(1), 16(1)(a) & (c), 30, 33 and 34

Please consider revising “the railway premises or any part thereof” to “any part of the railway premises” to make the reference consistent with

the proposed by-laws 21, 27 and 32. Please also note that in similar by-laws (i.e. by-laws 4, 6, 33, 36 and 37) in the existing Mass Transit Railway By-laws (Cap. 556 sub. leg. B) (the MTR By-laws), reference is also made to “any part of the railway premises”.

By-law 31

In the proposed by-law 31(6), what does “equipment” refer to? In a similar by-law (i.e. by-law 34(6)) in the existing MTR By-laws, “vehicle” is defined to include “the contents of a vehicle and any load carried by a vehicle”. Should this definition be adopted in the proposed by-law 31(6) to achieve consistency between by-laws applicable to the MTR, East Rail and West Rail on the one hand and the North-west Railway on the other?

References to “an official” and “any official”

Please make sure that the use of the reference to “official” in various by-laws of the draft NWR Bylaw is consistent. Since “official” is defined in by-law 2 of the draft NWR Bylaw, there is no need to include “of the Corporation” after “an official” or “any official. Examples of by-laws in the draft NWR Bylaw which contain the reference to “official” are by-laws 6, 9, 13(4) 11, 14, 15(2), 17 to 20, 25, 32, 35, 36, and 38 to 40. Please also refer to the usage of “official” in the MTR By-laws.

Penalties for offences under the draft NWR Bylaw

It is noted that no changes are proposed to the penalties for offences under the draft NWR Bylaw. As some of these offences are similar in nature to certain offences under the draft MTR Bylaw, the effect of this is that the penalties for similar offences committed on the MTR, East Rail and West Rail would be different from those committed on the North-west Railway. Examples of these offences are placing feet on seats and playing musical instruments, radio, cassettes, etc. The maximum fines for these two offences are \$1,000 and \$2,000 respectively under the draft NWR Bylaw while the maximum fines for these offences are proposed to be increased from \$2,000 to \$5,000 under the draft MTR Bylaw. In light of this disparity, please consider whether it is appropriate to revise the penalties for offences under the draft MTR Bylaw at this moment before

an overall review is conducted.

II. Draft Mass Transit Railway (Amendment) Regulation 2007

Proposed regulation 11

In the proposed regulation 11(6), where the Commissioner for Transport refuses to give approval relating to designation of rail stops, is the Commissioner required to give reasons for his refusal? If so, should this requirement be provided expressly in the same way as provided in the proposed regulation 11(4)?

Proposed regulation 13

- (a) While proposed regulation 11(6) refers to refusal of approval which is one of the matters that is subject to appeal under the proposed regulation 13(1), no reference is made to “notice” in the proposed regulation 11(6). Accordingly, is it appropriate to refer to “notice in respect of which the appeal is lodged” in the proposed regulation 13(2)?
- (b) In the proposed regulation 13(3), will the Secretary give reasons for his decision on an appeal? If so, should this be provided expressly?

III. Draft Kowloon-Canton Railway Corporation (Suspension of Bylaws) Bylaw

It is noted that some of the by-laws of the KCRC By-laws proposed to be suspended under the above Bylaw have not been included in the draft MTR Bylaw. Examples of these are by-law 8 (*surcharge for children under 12 years*), by-law 11 (*period of validity of first/standard class tickets*) and by-law 11A (*validity of monthly tickets*). It is noted that MTRCL will provide a paper to the Subcommittee setting out which by-laws currently provided in the KCRC By-laws will not be incorporated into the draft MTR Bylaw upon merger and the rationale for not incorporating them.

IV. Draft Kowloon-Canton Railway (Restricted Area) (No. 2) (Amendment) Notice 2007

The above draft Notice proposes to suspend the operation of the Kowloon-Canton Railway (Restricted Area) (No. 2) Notice 1997 (Cap. 372 sub. leg. I). Upon the suspension of the said Notice, the MTR Corporation Limited (MTRCL) is required to make a fresh notice in place of the original Notice made under Cap. 372. Please clarify whether the notice is to be made under by-law 28E or 41B of the draft MTR Bylaw. If the notice is to be made under the proposed by-law 41B, please confirm whether the Gazette notice is to be published as a general notice or legal notice.

V. Draft Mass Transit Railway (Transport Interchange) (Amendment) Bylaw 2007 (2007 Bylaw)

- (a) In making the 2007 Bylaw, MTRCL is required to act within the scope of powers conferred on it by section 34 of the Mass Transit Railway Ordinance (MTRO); otherwise, any bylaw made might be subject to legal challenge on the ground that it is ultra vires. Apparently, the proposed bylaw 1(2) is a consequential amendment made upon change of the Chinese name of MTRCL as a result of the rail merger. Section 34 of MTRO, when compared with section 33 (which confers powers on the Secretary for the Environment, Transport and Works to make regulations), is drafted in narrower terms in that the Corporation, unlike the Secretary, is not empowered under section 34 to make bylaws for other purposes that may be necessary to carry out effectively the provisions of MTRO. Based on the difference in the way sections 33 and 34 of MTRO is drafted, it would seem open to the courts to give a narrow interpretation to the scope of MTRCL's bylaw-making powers under section 34 in that those powers have been exhaustively set out in that section. If this interpretation is adopted, it is doubtful whether MTRCL would have power to make the proposed bylaw 1(2) under section 34 of MTRO. Please therefore clarify the legal basis for making the bylaw concerned. It seems that it would be on safer legal grounds if

such consequential amendment is made in a bill rather than in a bylaw made by the Corporation.

- (b) In light of paragraph (a) above, please also clarify the legal basis on which MTRCL is empowered to make other consequential amendments as proposed in the 2007 Bylaw.
- (c) On the assumption that MTRCL is empowered to make the proposed by-law 1(2), please consider whether it is desirable to provide for an interpretation provision to reflect the change of the Corporation's Chinese name. Would it be clearer if textual amendments are made to the Chinese name of the Corporation which appears in various provisions of the principal Bylaw.
- (d) On the assumption that MTRCL is empowered to make bylaws relating to consequential amendments, should the forms in Schedule 3 to the principal Bylaw be amended as well?
- (e) Please note that under the principal Bylaw, a provision of the Bylaw is referred to as a "section" instead of "bylaw". Please refer to section 14(7) and 15(4) of the principal Bylaw for examples of this reference. To achieve consistency in drafting, the reference to "Bylaw 1" in the proposed section 3 of the 2007 Bylaw should be replaced by "Section 1". In the proposed section 3(a) of the 2007 Bylaw, please replace "bylaw 1(1)" with "section 1(1)". In the proposed section 3(b), please replace "paragraph (1)" with "subsection (1)".

Prepared by

Legal Service Division
Legislative Council Secretariat
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